order that the creditor was only allowed interests at 18% per annum in respect of the sum of RM294,752.87 up to 30 June 1988. The interest charged from 1 July 1988 to 14 June 1991 as stated in the bankruptcy notice was therefore contrary to the terms of the consent order.

It is to be noted that in the bankruptcy notice the sum of RM280.000 obtained from the sale of the property was split into two figures namely, RM201.615 which was deducted from the sum of RM146.652.09 plus interest and 78,384.49 which was deducted from the sum of RM294.752.87 plus interest and costs. The consent order clearly stated that "... the sum of RM280.000 shall be deducted from the judgment sum..." It did not authorise the creditor to split the proceeds of sale in the manner it was done in the bankruptcy notice. Here again the creditor had not acted in accordance with the terms of the consent order.

Applying the principle laid down in *Datuk Mohd Sari's* case, I found that in the present case, the debtor did not raise only the question that the amount demanded in the notice was in excess of the amount actually due. The debtor indeed went furtherto state that the amount demanded in the notice was not calculated in accordance with the terms of the consent order. I was satisfied that, for the reasons stated above, the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent order as required by s. 3(l)(i) of the Bankruptcy Act. The bankruptcy notice was therefore invalid and non-compliance with the bankruptcy notice did not constitute an act of bankruptcy on the strict construction of the Bankruptcy Act.

The creditor's petition was founded on the said bankruptcy notice and since the bankruptcy notice was not valid the creditor's petition must fail.

For the reasons stated above I dismissed the creditor's petition with costs.

RELIANCE OMNIBUS CO. SON. BHD. & ANOR.

v.

ISHAK BIN MOHD. JAAFAR & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 12-9-92 (92)]
18 JUNE 1993

TORT: Roadaccident - Both vehicles travelling in same direction - Two conflicting versions of how accident occurred - Trial Court sought assistance fromother silent evidence,pleadings, sketch plan and police photographs - Trial Court rejected version of 1st plaintiff and found 1st plaintiff/rider of motorcycle wholly to be blamed for accident but held defendant wholly liable to 2nd plaintiff/pillion • Whethertrial Courtin concluding 1st plaintiff/rider wholly liable for accident could still find defendant wholly liable for the 2nd plaintiff/pillion's claim • Trial Court impressed by demeanour of certain witnesses - Whether appellate Court still has an obligation to scrutinize their evidence.

This was an appeal from the decision of the Sessions Court Judge, Kuala Kangsar, in respect of a claim for damages arising from an accident between a motorcycle ridden by the 1st plaintiff with the 2nd plaintiff seated as a pillion and a motor bus. At the conclusion of the trial, the Sessions Court Judge held that the 1st plaintiff was wholly to blame for the accident but held the defendants to be wholly liable for the 2nd plaintiff/pillion's claim.

Held:

[1] It is trite law that the finding of a trial Judge on which of the two conflicting versions of an accident is to be believed would normally be unassailable unless the appellate Court on reviewing the evidence forms the opinion that the Judge was clearly wrong.

[2] The trial Court having held the first plaintiff wholly to be blamed erred in concluding that h the defendants are wholly liable to the second plaintiff. The basic law of negligence is clear on this point that the person who is liable is the tortfeasor. In this instant appeal, the trial Court had held that the tortfeasor is the first plaintiff and not the second defendant.

[3] The second defendant owed a duty to the first plaintiff. The second defendant while driving the motorbus must have noticed the motorcyclist much earlier than the 20 feet range and had he paid undivided attention to the road at the material time, he could have swerved to the left side where an jample space of 16 feet wide awaited him and would, in the circumstances, have avoided the accident. Accordingly liability was apportioned equally between both parties, that is, the 1st plaintiff and the second defendant.

[4] The second plaintiff is entitled to recover the whole of the damages (100%) awarded by the trial Court notwithstanding in the instant appeal, the first plaintiff and the second defendant were held equally negligent. It is the prerogative of the 2nd plaintiff whether to recover the whole of the damages against the defendants or against the first plaintiff.

[Both parties found equally liable for the accident. Each party to bear his own costs].

Cases referred to:

London Passenger Transport Board v. Upson [1949] AC 155 ***(refd)***

Page v. Richards & Drapen, unreported ***(refd)***

Tart v. Chitty & Co. [1933] 2 KB 453, 457 ***(refd)***

P.R. Panickar v. Chwee May Kwong & Anor. [1958] MLJ 136 ***(refd)***

Nicholas Arthur Nock v. Mohamed Mi bin Suleiman & Anor. [1976] 1 MLJ252 CA ***(refd)***

Wee Soon Hian v. Lai Ching Mow [1968] 2 MLJ 82 ***(refd)***

Singapore Bus Service Ltd. v. Lim Swee Pheng & Sons (Pte) Ltd. [1980] 1 MLJ 53 ***(refd)***

Murugan v. Lew Chu Cheong [1980] 2 MLJ 139 ***(dist)***

Benmax v. Austin Motor Co. Ltd. [1955] AC 370 ***(refd)***

Yuill v. Yuill [1945] 1AUER 183, 188 ***(foll)***

Kerry v. Carter [1969] 1 WLR 1372, 1376 ***(foll)***

Dingle v. AssociatedNewspapers Ltd. [1961] 2 QB 162, 188 ***(refd)***

Corstar (Owners) v. Eurymedon (Owners), The Eurymedon [1938] 1 All ER 122 ***(refd)***

Ngooi Ku Siong & Anor. v. Aidi Abdullah [1985] 1 MLJ 30 FC ***(refd)***

Oil Mohamed v. Keith Murphy & Anor. [1969] 2 MLJ 244 ***(foll)***

Wong Fook @ Wong Fong & Anor. v. Abdul Shukor bin Abdul Halim & Anor. [1990] 2 CLJ 382 ***(foll)***

For the plaintiffs - William John; M/s. William John &Co.

For the defendants - Gunasegaran Suppiah;M/s. C.K. Leong & Co.

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:

This is an appeal from the decision of the Judge, Sessions Court, Kuala Kangsar ("the trial Court"). The claim before the trial Court was for damages arising from an accident between a motorcycle and a motorbus occuring at the 28 1/2 milestone, Kuala Kangsar/Ipoh main road. The two vehicles were travelling in the same direction, that is, from Kuala Kangsar towards Ipoh; the second appellant/defendant travelling behind the first respondent/plaintiff who was carrying the second respondent/plaintiff as pillion.

As regards liability, the trial Court held that the first respondent/plaintiff was wholly to blame for the accident but ironically held the appellants/defendants to be wholly liable to the second respondent/plaintiff.

What transpired before the trial Court was that after hearing the evidence of both parties, he found that they gave conflicting versions of the accident, whereupon he proceeded to seek assistance from the other silent evidence itemised in his decision as the pleadings, sketch plan and the police photographs to decide which of the two versions could be accepted as probably the true version.

It would appear that the trial Court rejected the version of the respondents/plaintiffs primarily because he found the damages to the first respondent/plaintiffs motorcycle more consistent with the second appellant/defendant's version of the accident and that the police photographs of the damages of the first respondent/plaintiffs motorcycle did not substantiate the statement of claim of the respondents/plaintiffs that the second appellant/defendant's motorbus knocked his motorcycle from the rear.

At the hearing before the trial Court, the first respondent/plaintiff gave his version of the accident as to how it occurred. In his evidence, he stated that on the day in question, he was riding his motorcycle with his daughter as pillion intending to go to his in-laws' house which is 200 yards from the main road. He further stated that before turning into the main road he did not notice any vehicles on the main road and that as he proceeded along the main road he indicated by light signal to, turn right and stopped at the centre broken white line. At that stage, he

stated that he did not see any vehicles from the front nor at the back. In cross-examination, he said he was on his third gear and that he did not hear engine noise from any vehicles or any vehicles honking and that his speed was 15 to 20 kilometres per hour. He also denied in cross-examination that he cut across without any warning. The evidence of the first respondent/plaintiff was not corroborated or supported by the pillion rider (the second respondent/plaintiff) who in her evidence merely asserted that she did not know how the accident had happened.

The second appellanVdefendant on the other hand stated that he was driving the motorbus from Kuala Kangsar towards Ipoh and his speed at the material time was 60 to 65 kilometres per hour and on approaching Kota Lama Kiri, he noticed a motorcycle crossing the main road when the motorcycle was about 20 feet infront of his motorbus. The second appellant/defendant honked and swerved to his right but due to close proximity, the accident occurred.

The trial Court would seem to have overlooked the more pertinent and salient features of the evidence. Firstly, it was not disputed that the main road (the Kuala Kangsar/Ipoh stretch) was a straight road and that visibility was good. The second appellant/defendant was driving a motorbus, having a higher perspective of the road and he had a duty to keep a good look out while driving. He can be said to be in charge of a huge vehicle capable of doing great damage, and he is usually able to observe motorcyclists on the road and to warn them if they appear to be unaware of his approach. As was observed by Lord Uthwatt in *London Passenger Transport Board v. Upson* [1949] AC 155:

> A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form these follies commonly take.

The second appellant/defendant's failure to keep aproper lookout was, in my opinion, partly the cause of the accident. It is a well known fact that the power of control is illusory if the driver is not paying attention to the road. The sharpness of the look out required depends upon the circumstances existing at the material time. In the instant appeal, the second appellant/defendant was driving in a built-up area (this was admitted by the second appellant/defendant under cross-examination) and had he used ordinary care and kept a proper look out he would have seen the first respondentyplaintiff not 20 feet away but much earlier and could have prevented the accident. I must stress here that a driver of a motor bus should always anticipate the possible presence of others on the road and should always be able to stop within the range of his permitted vision. As Rowlatt J. in *Page v. Richards & Drapen*, unreported, and cited in *Tart v. Chitty & Co.* [1933] 2 KB. 453,457 said:

> It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be things or people or animals in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course, at any time to avoid anything he sees, after he has seen it. If there is any difficulty in the way of his seeing, like a fog, for instance, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the driver, the defendant, is in this dilemma, either he was not keeping a sufficient look out, or, if he was keeping the best look out possible, then he was going too fast for the look out that could be kept.

Secondly, that the first respondent/plaintiff in his evidence stated that he gave a light signal of his intention to turn to the right whilst he was approaching the centre dotted white line. This is borne out by the police report lodged by the first respondent/plaintiff though he merely stated that he gave an isyarat (signal) only. *Thirdly*, the motorcyclist did not emerge from the side road onto the main road as alleged by both parties before the trial Court. It was not averred in the statement of claim that the motorcyclist was emerging from the side road. However, in the statement of defence under column: Particulars of first plaintiffs negligence, it was averred that the motor-cyclist "gagal memberhentikan motosikal No. AAS 1516 di tepi jalan sebelum menyeberangi/memasuki dan/atau melintas Jalan Besar". But the silent evidence especially the sketch plan and the police photographs do not show the presence of any side road.

Fourthly, the police report lodged by the first respondent/plaintiff some 13 days after the accident did not speak of the motorcycle being hit from the rear though this was averred in the statement of claim. However, in his evidence before the trial Court he stated that the motorbus crashed onto the right side of his motorcycle. It

is trite law that where a party deviates in his oral evidence in Court from his pleaded defence, then his account as given in Court as to how the accident occurred is highly suspect (see *P.R. Panickaru. Chwee May Kwong & Anor*. [1958] MLJ136). The sanctity of sticking like a glue to one's pleadings have been stated in a number of authorities, foremost being *Nicholas Arthur Nock v. Mohamed Ali bin Suleiman & Anor*. [1976] 1 MLJ 252 CA.

Fifthly, though the police report lodged by the second appellant/defendant was made 35 minutes after the accident yet it was at variance with the evidence of the second appellant/defendant and the sketch plan together with the police photographs especially in regard to two material aspects, viz, the braking of the motorbus and the motorbus being dented in the front portion. Under cross-examination, the second appellant/defendant admitted that both his evidence before the trial Court and the contents of his police report were the truth. Under re-examination, the second appellant/defendant admitted making a police report but denied its contents before the trial Court. In *Wee Soon Hian v. Lai Ching Mow* [1968] 2 MLJ 82, a passenger in a taxi which skidded causing him injuries made a police report but denied its contents in Court. He stated that the report was recorded by a police officer as dictated by the defendant, the taxi-driver himself in his presence and that the report contained the taxi-driver's version of the accident. In Court he alleged that the defendant was driving fast whilst negotiating a bend, skidded and fell into a ditch. The Court found that the contents of his report were true and that he had subsequently falsified and tailored his evidence to suit the remedy he was seeking. See also the case of *Singapore Bus Service Ltd. v. Lim Swee Pheng & Sons (Pte) Ltd.* [1980] 1 MLJ 53 on the same point where the Court in a similar vein found as a fact that the driver was not telling the truth and rejected his evidence.

Sixthly, on perusal of the sketch plan, the point of impact must naturally have been somewhere before one comes to IT. The line of the scratch, if projected backwards from 'H' would still be on the centre of the road, near to the dotted centre white line and this gives some clue to the point of impact. Now, remembering that the first respondent/plaintiff had stopped at the centre dotted white line, with his light signal on before turning to the right, it can therefore safely be inferred that the version of the first respondent/plaintiff was probably true. That the left portion of the motor bus at the passenger's door side hit the right side of the motorcycle is clearly borne out by the police photographs. The left side of the main road according to the sketch plan, is 10 feet wide and the red laterite road on the left side is 6 feet wide, making a grand total of 16 feet wide. Whereas the right side of the main road, according to the sketch plan, is 10 feet wide and the tarred road on the right side is 4 feet wide, making a grand total of 14 feet wide. On the left side of the road as one faces Ipoh, there is a bus stand at point "i" which means that the red laterite road on the left side is usable and flat and not undulating (tidak rata) as alleged by the second appellant/defendant. Thus, had the second appellant/defendant paid undivided attention to the road at the material time, he had ample opportunity to swerve to the left with 16 d feet wide road at his disposal, and would in the circumstances, have avoided the unfortunate accident from happening.

Lastly, it was the appellants/defendants' case in the Court below that the first respondent/plaintiff suddenly swerved to the right thereby causing the accident. The trial Court was under the mistaken impression that the first respondent/plaintiffs motorcycle suddenly turning across the second appellant/defendant's path was crucial as in the case of *Murugan v. Lew Chu Cheong* [1980] 2 MLJ 139. But the facts in the instant appeal are not on all fours with *Murugan.*

As demonstrated, the trial Court preferred the version of the second appellant/defendant purporting to rely on the silent evidence but failed, however, to draw the proper inferences from the available evidence. It is trite law that the finding of a trial Judge on which of the two conflicting versions of an accident is to be believed would normally be unassailable unless the appellate Court on reviewing the evidence forms the opinion that the Judge was clearly wrong. It is also correct to say that an appellate Court is in as good a position as the trial Judge to draw its own conclusions from the primary undisputed facts (*Benmax v. Austin Motor Co. Ltd.* [1955] AC 370). It is incorrect to assume, as a matter of course, that just because the trial Judge had seen and heard the witnesses, he must necessarily be right. I am of the considered view, even where the trial Judge has been impressed by the demeanour of certain witnesses, the appellate Court has still an obligation to scrutinize their

evidence. The approach to the exercise of the power available to an appellate Court is as stated by Greene MR in *Yuill v. Yuill* [1945] 1 All ER 183,188 where he said:

> Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced Judge may, albeit rarely, be deceived by a clever liar or led to form an unfavourable opinion of an honest witness and may express his view that his demeanour was excellent or bad, as the case may be. Most experienced Counsel can, Ihave no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial Judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial Judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the Judge as to his demeanour must necessarily lose its value.

On the function of an appellate Court, Lord Denning MR in *Kerry v. Carter* [1969] 1 WLR 1372, 1376 had this to say:

> I think that the attitude of this Court was correctly stated in that case (*Brown v. Thompson* [1968] 1 WLR 1003 at p. 1012, by Edmund Davies LJ when he quoted from the judgment of Sellers LJ in *Qunitas v. National Smelting Board* [1961] 1 WLR 401, 409). This Court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts; but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong.

As stated in the early part of this judgment, the trial Court held the first respondent/plaintiff wholly to be blamed. But the trial Court erred in concluding that the appellants/defendants are wholly liable to the second responden/plaintiff. Now, the basic law of negligence is clear on this point: the person who is liable is the tortfeasor (see *Dinglev. Associated Newspapers Ltd.* [1961] 2 QB 162,188). In the instant appeal, the trial Court had held that the tortfeasor is the first respondent/plaintiff and not the second appellant/defendant.

It is trite law that a person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he might be hurt himself. Put in another way, if the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not otherwise have made, then both are equally liable (see Corstar (Owners) v. Eurymedon (Owners), The Eurymedon [1938] 1 All ER 122). In my considered view, the second appellant/defendant owe a duty to the first respondent/plaintiff. The second appellant/defendant while driving the motorbus must have noticed the motorcyclist much earlier than the 20 feet range and had he c paid undivided attention to the road at the material time, he could have swerved to the left side where an ample space of 16 feet wide awaited him and would in the circumstances, have avoided the accident. Accordingly, I apportion liability equally among both parties (that is, between the first respondent/plaintiff and the second appellant/defendant).

As regards the damages, as there was no appeal, I would not disturb them. The trial Court had rightly applied the correct principles in assessing damages according to the discernible trend or pattern of awards in reasonably comparable cases (see *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1985] 1MLJ 30 FC).

As regards the second respondent/plaintiff, an innocent third party (a pillion rider), she is entitled, in my considered view, to recover the whole of the damages in this case. It is sufficient for her to prove negligence against the second appellan ^defendant even if it is not the whole of the negligence. She is entitled to recover the whole of the damages (100%) awarded by the trial Court notwithstanding my judgment in the instant appeal that the first responden/plaintiff and the second appellant/defendant were equally negligent. It is her prerogative whether to recover the whole of the damages (100%) against the appellants/defendants or against the first respondent/plaintiff(see *Oli Mohamed v. Keith Murphy & Anor.* [1969] 2 MLJ 244 and *Wong Fook © Wong Fong & Anor. v. Abdul Shukor bin Abdul Halim & Anor.* [1990] 2 CLJ * 382). On the other hand, the first respondent/ plaintiff is entitled to recover partly from his own insurance company and partly from the second appellant/defendant for the damages incurred by him.

I confirmed the interests awarded by the trial Court.

However, having regard to the circumstances of this case, I order that each party pay his own costs here and in the Court below.

Order accordingly.

TUAN HAJIMUSTAPHA KAMAL BIN HAJI ABU DAKAR

v.

ABDUL KADIR BIN ENDUT AND ROKIAH BTE. BABA (CLAIMANT)

HIGH COURT, KUALA LUMPUR
DATO'V.C. GEORGE J.
[APPLICATION FOR EXECUTION NO. 37-165-1991]
29 JUNE 1993

EXECUTION: Writ of seizure and sale - Goods seized from defendants house - Defendant's wife filing notice of claim in respect of all the items seized - Appeal against SAR's finding in favour of the claimant on the interpleader summons.

The plaintiff obtained final judgment against the defendant and sought to execute the judgment by way of a writ of seizure and sale. The bailiff seized certain items from the premises stated on the writ of seizure and sale. The claimant, the wife of the judgment debtor, contended that she was the rightful owner of the items seized and sought their return. The SAR found in favour of the claimant and the plaintiff appealed. The claimant also appealed for costs of the proceedings before the SAR.

Held:

[1] In a case of this nature, at the interpleader stage, the burden should initially be on the judgment creditor to prove on a balance of probabilities that the goods seized were properly identified as being that of the judgment debtor and only if he succeeds in doing that does the burden shift.

[2] The judgment creditor had not laid the foundation for any presumptive ownership in the judgment debtor in respect of the goods seized.

[3] The judgment creditor had not proved that the goods belonged to the judgment debtor and in any event the claimant has proved on a balance of probability that the seized furniture and microwave oven had been purchased by her and as such they belonged to her and not to the judgment debtor. She has also shown that the air-conditioners were not that of the judgment debtor.

[4] As for the argument that the doctrine of Harta Sepencarian would give the claimant at